



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SEP 25 2008

Brynne Sissom, Treasurer
Eric Roberson for Congress
4514 Cole Avenue, Suite 300
Dallas, TX 85205

RE: MUR 5983

Dear Ms. Sissom:

On March 25, 2008, the Federal Election Commission notified Eric Roberson for Congress Campaign and you, as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On September 18, 2008, the Commission found, on the basis of the information in the complaint, information provided by you, and information available to the public, that there is no reason to believe Eric Roberson for Congress Campaign and you, in your official capacity as Treasurer, violated 2 U.S.C. §§ 441a(a) and 434(b). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Camilla Jackson Jones, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark D. Shonkwiler".

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

28044212527

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Eric Nelson Roberson **MUR: 5983**
Eric Roberson Senate Exploratory Committee
Eric Roberson for Congress Campaign
and Brynne Sissom, in her official capacity as Treasurer

I. INTRODUCTION

This matter involves alleged misuse of the "testing the waters" exemption by an individual who considered a campaign for the U.S. Senate during the first half of 2007 without filing a statement of candidacy, but became a candidate for the U.S. House of Representatives later in the 2008 election cycle. Complainant alleges that Eric Nelson Roberson violated the Federal Election Campaign Act of 1971, as amended, ("the Act" and "FECA") by failing to file a statement of candidacy for his Senate candidacy, and that Eric Nelson Roberson and the Eric Roberson Senate Exploratory Committee (the "Exploratory Committee") violated the Act by inappropriately using the "testing the waters" exemption to avoid registering and reporting as a political committee. *See* 2 U.S.C. §§ 432(e)(1), 433(a) and 434(b). The Complaint also alleges that the Eric Roberson for Congress Campaign and Brynne Sissom, in her official capacity as Treasurer (the "Congressional Committee"), accepted and failed to disclose an excessive in-kind contribution by using his employer's office as his campaign headquarters. *See* 2 U.S.C. §§ 441a(a) and 434(b).

Respondents deny the allegations and assert that Complainant has drawn inferences that are inaccurate and unsubstantiated. Response at 1-3. Roberson asserts that he never held himself out as a Senatorial candidate and that his Senatorial exploratory efforts ceased long

1 before he decided to run for a seat in the U.S. House of Representatives. *Id.* at 3-5. Roberson
2 also asserts that his Congressional Committee did not receive any in-kind contribution from his
3 employer, and that he paid for any incidental use of office space by his campaign. *Id.* at 7-8.

4 Based on a review of the Complaint, the Response and publicly available information, the
5 Commission determined that Roberson's exploration of a possible Senate campaign never
6 crossed the line from "testing the waters" and ceased around June 2007. It also appears that
7 Roberson's January 2008 Statement of Candidacy for the congressional seat, and subsequent
8 Congressional Committee filings and disclosures were made in a timely manner.

9 Accordingly, the Commission found no reason to believe that Eric Roberson violated 2
10 U.S.C. § 432(e)(1) by failing to file a Statement of Candidacy in connection with the Senate
11 election, or that Eric Roberson and the Eric Roberson Senate Exploratory Committee violated 2
12 U.S.C. §§ 433(a) and 434(b) by failing to file a Statement of Organization and other disclosure
13 reports. The Commission also exercised prosecutorial discretion and dismissed the allegation
14 that Eric Roberson and the Eric Roberson Senate Exploratory Committee violated 2 U.S.C. §
15 441a(a) by making excessive contributions to another candidate's exploratory committee.
16 Finally, the Commission found no reason to believe that the Eric Roberson for Congress
17 Campaign and Brynne Sissom, in her official capacity as Treasurer, violated 2 U.S.C. §§ 434(b)
18 and 441a(a) by accepting and failing to disclose an excessive in-kind contribution.

19 **II. FACTUAL AND LEGAL ANALYSIS**

20 In January 2007, Eric Roberson started an exploratory committee for the U.S. Senate in
21 Texas, the Eric Roberson Senate Exploratory Committee. By March 2007, Roberson had raised
22 approximately \$9,300 from a variety of donors through personal solicitations, without making
23 any written appeals. Response at 3. From January through June 2007, when the Senate

28044212529

1 exploratory efforts are reported to have ceased, Roberson activities included: (1) purchasing the
2 website URL address www.ericroberson.org, but not publishing the site to the public; (2) having
3 talks with Party Leaders, including County Chairs, State Democratic Executive Committee
4 Members and the State Party Chair, as well as rank-and-file Democrats; (3) having detailed
5 discussions with political consultants; and (4) speaking with other potential Democratic
6 candidates for the U.S. Senate seat to assess his prospects. Response at 4-5. Roberson asserts
7 that he did not hold himself out to the public or anyone with which he spoke as having made a
8 final decision to become a Senate candidate. *Id.*

9 In early Spring 2007, Roberson claims he met with Mikal Watts, who was also exploring
10 a Senate campaign. Response at 1-2. After that meeting, Roberson states that he determined that
11 Watts had a better chance at the candidacy and decided to end his exploratory efforts. He also
12 decided to sponsor an exploratory fundraising dinner for Watts, for which the Exploratory
13 Committee spent \$1,400. *Id.* Soon thereafter, the Roberson Exploratory Committee made cash
14 contributions to Watts' exploratory committee totaling \$2,555, amounts that Watts later refunded
15 after he decided not to run. *Id.* at 5-6.

16 Roberson states that in mid-December 2007, six months after ceasing all exploratory
17 activities in connection with the Senate seat, he became aware that the previous District 32nd
18 Democratic Congressional candidate was not going to seek the Party's nomination. Response at
19 2. He asserts that in late December 2007 he decided to run for the Congressional seat, paid the
20 fee to get on the ballot and transitioned funds from his dormant Senatorial exploratory committee
21 to a Congressional campaign committee. *Id.* Roberson states he then reactivated his URL
22 address, now displaying the "Eric Roberson for Congress Campaign" name, filed his Statement
23 of Candidacy on January 4, 2008 and the Committee's Statement of Organization on January 14,

2008. *Id.* at 5. The Congressional Committee filed its first pre-primary disclosure report in February 2008, covering the period 12/19/07 – 2/13/08, and filed all subsequent disclosure reports in a timely manner. During his Congressional primary campaign from January-April 2008, Roberson used his office at the Mulligan Law Firm, a sole proprietorship, as his Committee's nominal headquarters. The primary election was held March 4, 2008 and a primary runoff election was held April 8, 2008.

Complainant, who was one of Roberson's opponents in the March 2008 Texas 32nd Congressional District Democratic Primary, and in a subsequent April 2008 primary run-off, lists the following as evidence that Respondents violated the FECA:

- Roberson and the Exploratory Committee accepted more than \$9,300 during the first quarter of 2007, and that this amount exceeded the threshold for registering as a candidate and the funds needed to simply test the waters;
- The Exploratory Committee purportedly used at least two variations on its name (Eric Roberson Senate Exploratory Committee and Senatorial Exploratory Committee) in FEC Reports, suggesting the existence of multiple committees;
- Roberson and the Exploratory Committee put up a website in violation of the prohibition on public political advertising while testing the waters;
- Roberson appeared to have joined a candidate-endorsing organization, Texas Values in Action (TEX VAC), when he made a \$300 disbursement to the group in May 2007;
- Roberson and the Exploratory Committee made in-kind contributions and cash donations to another candidate's exploratory committee;
- Roberson tested the waters for a full year between formation of the Senate Exploratory Committee and the declaration of his Congressional candidacy; and
- Eric Roberson for Congress Campaign failed to report the in-kind contribution it received from Roberson's employer, the Mulligan Law Firm, who allows him to use his business address as the Congressional Committee's campaign headquarters.

1 The allegations relating to the activities of the Senate Exploratory Committee and the
2 Congressional Committee are discussed separately below.

3 A. Senate Exploratory Committee

4 1. Roberson's "Testing the Waters" Status

5 The Act provides that an individual becomes a "candidate" when he or she has received
6 or made in excess of \$5,000 in contributions or expenditures. 2 U.S.C. § 431(2). Achieving
7 "candidate" status triggers registration and reporting requirements for the candidate and for his
8 principal campaign committee. Within 15 days of becoming a candidate, the individual must file
9 a statement of candidacy with the Commission that designates the candidate's principal
10 campaign committee. 2 U.S.C. § 432(e)(1); *see also* 11 C.F.R. § 101.1(a). The principal
11 campaign committee must file a statement of organization no later than ten days after it has been
12 designated by the candidate. 2 U.S.C. § 433(a). All reportable amounts from the beginning of
13 the "testing the waters" period must be filed with the first financial disclosure report filed by
14 such committee, even if the amounts were received or expended prior to the current reporting
15 period. *See* 11 C.F.R. § 104.3(a) and (b).

16 However, the Commission's regulations provide that the terms "contribution" and
17 "expenditure" do not include funds received or payments made solely to determine whether an
18 individual should become a candidate. 11 C.F.R. §§ 100.72(a) and 100.131(a). Thus, an
19 individual may raise or spend more than \$5,000 without becoming a candidate if his or her
20 activities are permissible "testing the waters" activities, such as conducting polls, making
21 telephone calls, and travel. *Id.* The Commission has emphasized the narrow scope of this
22 exemption to the Act's disclosure requirements. *See Explanation and Justification for*
23 *Regulations on Payments Received for Testing the Waters Activities*, 50 Fed. Reg. 9992, 9993

1 (1985) ("The Commission has, therefore, amended the rules to ensure that the 'testing the
2 waters' exemptions will not be extended beyond their original purpose. Specifically, these
3 provisions are intended to be limited exemptions from the reporting requirements of the
4 Act . . .").

5 When an individual raises or spends more than \$5,000 and engages in activities that
6 indicate he or she has decided to run for a particular office, the "testing the waters" exemption is
7 no longer available. These activities include: raising funds in excess of what could reasonably be
8 expected to be used for exploratory activities or activities designed to amass funds to be spent
9 after becoming a candidate; making or authorizing written or oral statements that refer to the
10 individual as a candidate for a particular office; or conducting activities in close proximity to the
11 election or over a protracted period of time. 11 C.F.R. §§ 100.72(b) and 100.131(b).

12 The information submitted in response to the Complaint, as well as the publicly available
13 information does not suggest that Roberson engaged in the kind of conduct described in
14 11 C.F.R. §§ 100.72(b) and 100.131(b) that would remove him from the "testing the waters"
15 exemption. Although Complainant alleged that \$9,300 is an excessive amount of cash to receive
16 or spend for an exploratory effort, Respondent argues that other candidates raise and spend
17 hundreds of thousands of dollars and take several months to test the waters. Response at p. 3.
18 After Roberson passed the \$5,000 threshold, he made inquiries with the Commission to ascertain
19 the regulations for the "testing the waters" exemption, and asserts that this contact confirmed his
20 understanding that he was not required to register and report as long as he had not decided to
21 become a candidate, had never held himself out as a candidate, and had never behaved in a
22 manner to reflect a decision to become a candidate. *Id.*

1 The disclosure report for the Exploratory Committee shows no receipts (other than the
2 refund of a prior contribution to another candidate's exploratory committee) and only minimal
3 expenditures between June and December 2007. There are no published event schedules or any
4 other evidence of activities conducted by the Exploratory Committee. There are also no public
5 statements by Roberson or others that might indicate Roberson actually had made the decision to
6 become a Senate candidate.

7 Roberson states that while he purchased a URL address comprised of his name
8 (www.ericroberson.org) in February 2007, he did not publish his web address and only friends,
9 political consultants and website developers working on the site reviewed its contents, while he
10 experimented with difference looks, functions, and audio/video input. *Id.* At all times during the
11 exploratory period the moniker, "Roberson Senate Exploratory Committee" was prominently
12 displayed on the site. *Id.* After June 2007, he contends the website was pulled down and an
13 "Under Construction" page was the only item viewable on the internet, until it was reconstructed
14 as a Congressional campaign website in 2008. *Id.* A search of archived internet and media files
15 has found no references to Roberson's original website or the Senate Exploratory Committee.

16 The Complaint asserts that the Exploratory Committee's disbursement of \$300 to Texas
17 Values in Action PAC ("TEX VAC"), which is characterized as a candidate endorsing
18 organization, was to obtain an endorsement, and thus proof of Roberson's candidacy. Roberson,
19 on the other hand, describes the disbursement as payment for a dinner event sponsored by the
20 organization, and not a membership fee. *Id.* at 5. Roberson asserts that he is not a member of
21 the organization, but attended the dinner, "to meet important Democratic Party leaders and
22 additionally gauge the waters ... and the various names being floated about [for the] Senate run."
23 *Id.* There is no information to contradict these contentions.

From June 2007 to December 2007, the Exploratory Committee remained dormant except for minimal expenses relating to maintaining the website URL address. *Id.* at 4-5. The Exploratory Committee's disbursements reflect expenses associated with maintaining the website and URL address, a few staff meetings, purchasing of office supplies, stationary, and minimal photocopying and averaged a few hundred dollars a month. Because there is no indication that Roberson crossed the line from "testing the waters" to becoming a Senatorial candidate, subject to the Act's filing and reporting requirements, *see* 11 C.F.R. §§ 100.72(b) and 100.131(b), the Commission found there is no reason to believe that Eric Roberson or Eric Roberson Senate Exploratory Committee violated 2 U.S.C. §§ 433(a) and 434(b).

2. Exploratory Committee Contributions to Another Candidate

As discussed above, in Spring 2007, Roberson met with Mikal Watts, who was also exploring a Senate campaign, and decided to end his exploratory efforts and instead support Watts. Response at 1-2. On June 18, 2007, Roberson co-hosted a dinner for Mikal Watts, for which the Exploratory Committee spent \$1,400 for food and drinks. The Roberson Exploratory Committee also made cash contributions to Watts' exploratory committee totaling \$2,555. *Id.* at 5-6. This resulted in a total Exploratory Committee contribution to Watts in the amount of \$3,955. Roberson asserts that he contacted the FEC prior to expending the funds, "to insure that transferring money from [his] exploratory Committee to [Mikal Watts'] was appropriate." *Id.* at 2. Watts later decided not to run for the Senate seat and refunded the \$2,555 cash donation to the Roberson Exploratory Committee.

The Act provides that all contributions must comply with the limitations and prohibitions of the Act. *See* 2 U.S.C. § 441b. Specifically, the Act limits the amount of any contribution to a candidate for federal office or his authorized political committee, which in the aggregate, exceeds \$2,300 per election. *See* 2 U.S.C. § 441a(a)(1)(A). Because Mikal Watts was himself

1 "testing the waters" and never became a candidate, Roberson's donations would not have been
2 deemed "contributions" under the Act. *See* 11 C.F.R. § 100.72. However, if Watts had become
3 a candidate, Roberson's contributions would have exceeded the statutory limits by \$1,655.
4 Because the Watts Committee refunded the entire excessive contribution after Watts decided not
5 to become a candidate, and as a matter of prosecutorial discretion, the Commission dismissed
6 any allegation that the Exploratory Committee violated 2 U.S.C. § 441a(a).

7 3. Exploratory Committee Reporting Violations

8 Complainant alleges that Roberson illegally maintained two exploratory committees and
9 failed to file accurate and complete disclosure reports for these multiple political committees.
10 Complaint at 1. This allegation is based on the fact that both the names "Eric Roberson Senate
11 Exploratory Committee" and "Senatorial Exploratory Committee" appear in the "Name of
12 Committee" section of disclosure reports submitted by Roberson to the Commission along with
13 the initial reports filed by the Congressional Committee. *Id.* The Complaint also alleges that one
14 committee, the Senate Exploratory Committee, reported receiving a "refunded \$2,555 donation"
15 from Mikal Watts when it had never reported making such a contribution. Complaint at 2.

16 Roberson maintains that there was only one Committee and that the use of the term
17 "Senatorial Exploratory Committee" was simply shorthand that he used in a few pages of the
18 multi-page filings, but which referred to the "Eric Roberson Senate Exploratory Committee," and
19 that all reporting referred to the activities of a single committee. Response at 3-4. Roberson's
20 response and filings with the Commission, as well as publicly available information suggest that
21 there was a single Exploratory Committee. The disclosure reports clearly reflect the receipts and
22 disbursements of a single committee and the use of slightly different committee names, both of
23 which include the words "Exploratory Committee" and two derivations of the word "Senate"
24 (*i.e.*, Senate and Senatorial), does not mean there were two different committees. Moreover,

1 because the information indicates there was only one committee, Complainant's allegations that
2 the Exploratory Committee fraudulently reported the refund of a contribution that it never
3 received is without merit. The Exploratory Committee reported making two contributions to the
4 Watts' exploratory committee -- \$2,000 on June 19, 2007 and \$555.08 on July 2, 2007—the
5 refund of these donations, in the amount of \$2,555, was received on December 11, 2007.

6 Accordingly, the Commission found no reason to believe the Exploratory Committee violated
7 2 U.S.C. § 434(b).

8 **B. Congressional Committee/Candidacy**

9 During his Congressional primary campaign from January-April 2008, Roberson used his
10 office at the Mulligan Law Firm, a sole proprietorship, as his Committee's nominal headquarters.
11 Roberson asserts that the use of the facilities was done under an agreement with the Mulligan
12 Law Firm. Response at 7-8. He further contends that his use of the office for Committee
13 business was incidental, and restricted to a few hours a week. *Id.* at 8. His headquarters
14 occupied no additional space other than his regular business office, he used his cell phone as a
15 contact number, he used the office telephone less than one hour a week for Committee-related
16 business, the office had no dedicated telephone or fax lines, and was essentially nothing more
17 than an address where mail could be sent or volunteers could pick up materials, which were
18 stored in the trunk of his car or in a small section of his office closet. *Id.* Staff meetings were
19 conducted at one of the local eateries in the area. *Id.*

20 The Complaint alleges that the use of the Mulligan Law Firm office by the Congressional
21 Committee amounted to an in-kind contribution that was excessive and not disclosed to the
22 Commission. While Roberson asserts that his use of his office at the Law Firm was incidental
23 and permissible under his employer's policy of allowing employees to use their offices on a
24 limited basis for personal activities, he acknowledges that there may be some ambiguity as to

1 whether the Act's corporate/union incidental use exception set forth in 11 C.F.R. § 114.9(a) is
2 applied to an office owned by a sole proprietorship. Response at 7-8. Contemporaneously with
3 the initial use of the office space in 2008, Roberson ascertained the fair market value of an
4 executive suite "cyber office" package in the building in which his office is located as \$130. *Id.*
5 at 8-9. This includes up to 20 hours a month in dedicated office usage, use of a receptionist for
6 visitors and phone calls, receipt of facsimiles, closet space, a mail box and facilities for "at cost"
7 photocopying and metered mail or courier services, is \$130 a month. *Id.* Assuming *arguendo*
8 that the incidental use exception does not apply, the value that the campaign received from the
9 use of the office space would be approximately \$500. *Id.* Thus, the Congressional Committee
10 subsequently disclosed in its 2008 April Quarterly Report the \$500 as a debt owed by the
11 Congressional Committee to the Mulligan Law Firm. *Id.*

12 The Act permits the "incidental use" of a candidate's corporate office for campaign
13 activity, *see* 11 C.F.R. § 114.9(1), and mandates that all in-kind contributions to be subject to the
14 Act's contribution limits and reporting requirements. *See* U.S.C. §§ 441a(a) and 434(b).
15 Roberson's use of the office space appears to have been minimal, and the Congressional
16 Committee also reported the purported fair market value of the office space as a debt to the
17 Mulligan Law Firm in its 2008 April Quarterly Report. As such, there does not appear to have
18 been any excessive contribution.

19 Accordingly, the Commission found no reason to believe that the Eric Roberson for
20 Congress Campaign and Brynne Sissom, in her official capacity as Treasurer, violated 2 U.S.C.
21 §§ 441a(a) and 434(b).